STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRISTOL-MYERS COMPANY INDUSTRIAL DIVISION	:	DETERMINATION DTA NO. 808692
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1986 through August 31, 1988.	:	

Petitioner, Bristol-Myers Company Industrial Division, P.O. Box 4755, Syracuse, New York 13221, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1986 through August 31, 1988.

On March 11, 1992 and November 23, 1992, respectively, petitioner by its duly appointed representative, Bond, Schoeneck and King, Esqs. (Gary R. Germain, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by April 23, 1993. Petitioner submitted documents on March 4, 1992 (prior to and in anticipation of consenting to determination upon submission). The Division of Taxation submitted its documents on December 28, 1992. Petitioner submitted a brief on January 26, 1993. The Division of Taxation did not submit a brief in this matter. Consequently, petitioner did not submit a reply brief. After due consideration of the evidence and arguments, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax on waste removal and processing charges paid by petitioner.

II. Whether, if so, such imposition violates the Commerce Clause of the United States

Constitution.

FINDINGS OF FACT

On June 15, 1989, the Division of Taxation ("Division") issued to petitioner, Brisol-Myers Company Industrial Division, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1986 through August 31, 1988 in the amount of $36,853.88, plus interest.

Petitioner challenged the above notice of determination by requesting a conciliation conference. On January 25, 1990, a conciliation conference was held. Thereafter, on July 13, 1990, Conciliation Order No. 098182 was issued pursuant to which the amount of tax assessed was reduced to $14,393.51. This reduced amount represents tax calculated as due on fees paid by petitioner for pick-up, transportation, processing and disposal of certain hazardous wastes created at petitioner's East Syracuse, New York facilities. On June 14, 1990, prior to issuance of the Conciliation Order, petitioner consented to and paid tax in the amount of $4,552.35, representing tax due on the transportation portion of the services described above. This payment was noted (by footnote) on the Conciliation Order, thereby leaving at issue in this proceeding $9,841.16, representing tax calculated on fees paid for processing and disposal of the wastes.

As noted above, petitioner generates significant amounts of small quantity hazardous wastes on a continuous basis, which must be removed from its plant in East Syracuse, New York and thereafter treated for proper disposal. In order to meet this need for removal, treatment and disposal, petitioner contracted with Rollins Environmental Services, Inc. ("Rollins"), an entity which operates facilities for the treatment or destruction of hazardous waste. Rollins' facility, as relevant to this proceeding, is located in Bridgeport, New Jersey.

Included as part of petitioner's submitted documents were materials relating to a proposal by Rollins to handle the wastes generated by petitioner. By a letter dated July 1, 1991, Rollins advised petitioner that "hazardous and non-hazardous waste produced at [petitioner's] East Syracuse, New York facility may be transported in Rollins owned and operated equipment

OR in non-Rollins owned and operated equipment." Part of Rollins' written proposal to provide for petitioner the services described above included the following:

> "[Petitioner] desires turnkey Lab Pack services. These services to include labor, materials, labeling, manifesting, transportation, and disposal of packaged waste material."

The Rollins proposal goes on to more specifically describe each of the services to be provided, including management, manifesting, transportation, disposal and tracking (with certifications of destruction).

During the period in issue, petitioner opted to have Rollins provide the pick-up and transportation services as well as the treatment and disposal services for the wastes involved. Rollins' invoices to petitioner separately stated the charges for treatment and/or destruction of the wastes as well as the charges for pick-up and transportation of such wastes. As described above, the dollar amount of the assessment remaining in question is calculated based upon the fees paid by petitioner for treatment and disposal or destruction of the wastes at the Rollins facility located in Bridgeport, New Jersey (noting that petitioner has previously paid the tax calculated on fees paid for removal and transportation of the hazardous waste from petitioner's East Syracuse facility to the Rollins New Jersey facility).

CONCLUSIONS OF LAW

A. Tax Law § 1105(c) imposes a sales tax on receipts from sales, other than for resale, of certain enumerated services. The situs for the taxable event under section 1105(c) is found where the service is delivered (20 NYCRR 526.7[e][1]).

B. In this case, the relevant portions of Tax Law § 1105(c) are subdivisions (2) and (5) which provide, respectively, for tax on specified services, as follows:

> "(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.
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> * * *
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> "(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving

> such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public . . . ."

C. As described, the tax remaining at issue is based on petitioner's payments for waste treatment and disposal. The Division argues that transportation fees paid (even though separately stated), together with the balance of the processing and disposal charges, together constitute charges for an integrated waste removal service properly taxable as a service performed with respect to New York real property. The Division maintains that the New York situs of the waste generator (i.e., petitioner) allows taxing the entire receipt, notwithstanding that the treatment and disposal activities occur outside of New York. By contrast, petitioner argues that imposing the tax is improper as violating Commerce Clause standards, both because the services of treatment and disposal occur outside of New York and because petitioners' contacts with New York do not constitute sufficient nexus or connection with New York to allow taxation. Petitioner also points out that the type of waste involved here is hazardous waste, which cannot be disposed of without treatment or processing and for which petitioner remains liable if improper disposal occurs. Thus, petitioner maintains the treatment or processing elements may not properly be included as parts of a trash removal service (citing Matter of Cecos Intl. v State Tax Commn., 126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811).

D. The issues presented herein have been addressed by the Tax Appeals Tribunal in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992). General Electric had engaged a single vendor, Environmental Systems Company ("ENSCO"), to handle General Electric's PCB contaminated wastes. ENSCO sent its trucks into New York from Arkansas to pick up the hazardous waste and transport such waste back to Arkansas. ENSCO subsequently processed the waste by incineration in Arkansas and buried the postincineration ash and soot in a fully-permitted Arkansas landfill. The Division attempted to tax the entire cost charged by ENSCO to General Electric on the theory that all of the activities were part of an integrated trash removal service performed with respect to real property located in New York.

The Tribunal agreed that ENSCO's transportation, incineration and burial activities constituted an integrated waste removal service, citing Matter of Cecos Intl. v. State Tax Commn. (supra). However, the Tribunal, determined that the Division's attempt to impose tax on the out-of-state processing and disposal aspects of such service violated the Commerce Clause of the United States Constitution. More specifically, the Tribunal applied the four criteria articulated by the United States Supreme Court in Complete Auto Transit v. Brady (430 US 274, 51 L Ed 2d 72 [1977]) which must be satisfied in order for a tax on interstate activities to withstand Commerce Clause scrutiny. Under Brady, a tax will withstand Commerce Clause scrutiny if: (1) the activity is sufficiently connected to the State to justify a tax (the "substantial nexus" requirement); (2) the tax is fairly related to benefits provided the taxpayer by the taxing jurisdiction; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly apportioned.

At issue in the General Electric case were the first and fourth criteria. The Tribunal held, as noted above, that the services performed by ENSCO (transportation and treatment and disposal) constituted an integrated waste removal service performed (at least partly) in New York, and that General Electric had a significant presence in the State. Therefore, the Tribunal concluded that a sufficient nexus existed with New York State to support the tax. However, the Tribunal determined that the tax as applied failed the fourth criterion under Brady inasmuch as the sales tax imposed on ENCSO's services was not fairly apportioned. In reaching this latter conclusion, the Tribunal applied the two-prong analysis articulated in Goldberg v. Sweet (488 US 252, 102 L Ed 2d 607 [1989]) for determining fair apportionment. The first prong requires an analysis of whether the tax sought to be imposed is internally consistent, that is, the tax must be structured so that if an identical tax were to be imposed in another state, multiple taxation would not result. The second prong requires the tax to be externally consistent, that is, New York may tax only that portion of the revenues from the interstate activity which reasonably reflect the New York component of the activity being taxed. The Tribunal held that imposition of the sales tax in General Electric failed both the internal and external consistency tests, noting

first that if an identical tax statute existed in Arkansas, such state could impose tax on the entire transportation, processing and disposal charges on the theory that the transportation was an integral part of the waste removal service. The Tribunal noted that, at the least, tax could be imposed on the waste treatment as processing of tangible personal property. This apparent risk of multiple taxation, coupled with the lack of any credit provision in the New York statute to avoid such a result, violates the internal test. Further, the Tribunal held that since there exists a practical way to apportion the New York tax to the New York component portion of the integrated service (e.g., New York miles travelled or the New York transportation portion of the entire charge), a tax on the entire invoice amount, without apportionment, fails the external test.

This case, in fact, presents essentially identical circumstances to those in General Electric. In this case, as in General Electric, the entire invoice charge (transport, processing and disposal) was subjected to tax under Tax Law § 1105(c)(5) as an integrated waste removal service. Even though part of the transport, and all of the processing and disposal occurred outside of New York, no apportionment of tax was made. Accordingly, based upon the reasoning and holding of the Tribunal in General Electric, the sales tax as applied to petitioner herein violates Commerce Clause (apportionment) standards.[1]

E. Petitioner has argued in the alternative that the described services do not constitute an integrated waste removal service, but rather are separate and distinct services of transport and disposal (taxable [if performed in New York] under Tax Law § 1105[c][5]), and processing (taxable [if performed in New York] under Tax Law § 1105[c][2]). Petitioner maintains, as described, that processing of wastes may not be included with transportation and disposal as part of an integrated waste removal service (citing Cecos Intl. v. State Tax Commn., supra). This alternative argument merits brief discussion.

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[1]Given the foregoing, it is unnecessary to address the other three prongs of the Brady test. However, in General Electric, the Tribunal did find substantial nexus to exist because General Electric contracted for an integrated waste removal service which was performed (at least partly) in New York and because General Electric had a significant presence in New York. Here, petitioner sits in essentially the same position as General Electric.

Petitioner's argument runs counter to the Tribunal's analysis in General Electric. In fact, the Tribunal specifically addressed such an argument in its General Electric decision. In this regard, the Tribunal observed as follows:

> "Petitioner's assertion herein that processing of waste is not an integral part of the service of trash removal is apparently based on the [Cecos] court's conclusion that the processing of waste is a taxable transaction under section 1105(c)(2) (Matter of Cecos Intl. v. State Tax Commn., supra, at 937). Petitioner fails to place that discussion in the context of the facts in Cecos, namely, that the petitioner had transactions where it charged customers only for the processing of waste brought to its facilities by the customers and asserted that such charges were not taxable. In this context, the court held such charges taxable as processing under section 1105(c)(2)." (Id.; emphasis added.)

Simply stated, the fact that processing charges alone may be taxed under Tax Law § 1105(c)(2) does not require a conclusion that such charges cannot be included and taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service when such overall service, as opposed to simply processing by a landfill operator, is being offered. In this regard processing, which occurs between transport and disposal, could reasonably be called the "middle step" in an integrated waste removal service taxable as an integral part thereof under Tax Law § 1105(c)(5). To place petitioner's argument in full context, "tipping" or disposal fees alone are not taxable (at an in-state landfill), yet when coupled with pickup and transport become a taxable part of an integrated waste removal service (Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). Unlike tipping fees, processing of waste is taxable under Tax Law § 1105(c)(2), yet when processing is included together with pickup, transport and disposal, the same constitutes an integrated trash removal service the entire fee for which is taxable under Tax Law § 1105(c)(5) (Matter of Cecos Intl. v. State Tax Commn., supra). It does not follow that because processing, when offered alone, may be taxed under Tax Law § 1105(c)(2), it must be segregated out and taxed alone under such section in all instances and is precluded from being taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service. Such a conclusion would be inconsistent with the combined holdings of Penfold, Cecos and General Electric. Finally, petitioner further specifies its argument to be that hazardous waste, which cannot be disposed of without further treatment and for which petitioner remains liable in the

event of improper disposal, merits segregation and permits taxation (if processed in-state) under Tax Law § 1105(c)(2) but never under Tax Law § 1105(c)(5). This position is rejected. In fact, the waste at issue in General Electric was itself hazardous waste (PCB contaminated soil), yet the Tribunal found processing of the same to be susceptible to taxation as part of an integrated waste removal service under Tax Law § 1105(c)(5).

F. The petition of Bristol-Myers Company Industrial Division is hereby granted, and the notice of determination dated June 15, 1989 is cancelled.[2]

DATED: Troy, New York
June 10, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[2]As noted in Finding of Fact "2", petitioner has conceded and paid tax with respect to transportation charges. Further, petitioner specifies by brief that such amount remains uncontested (see, Petitioner's Brief, p. 10, footnote 1). Accordingly, no determination is rendered herein with regard to such amount. (It is observed that the same might be likened to an "in-fact" apportionment made by the parties.)